

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL LAWRENCE STOKEN,

Defendant-Appellant.

UNPUBLISHED

January 4, 2007

No. 268959

Eaton Circuit Court

LC No. 05-020257-FH

Before: Meter, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating while intoxicated, third offense (OWI-3rd), MCL 257.625(9)(c), and operating a motor vehicle with a suspended or revoked license, second offense, MCL 257.904(3)(b). The trial court, departing upward from a sentencing guidelines range of ten to forty-six months for the OWI crime, sentenced defendant as a fourth habitual offender, MCL 769.12, to five to twenty years’ imprisonment for that offense. The trial court also sentenced defendant to a concurrent term of 365 days’ incarceration for the operating with a suspended license conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). The Michigan Supreme Court has stated that “a ‘substantial and compelling reason’ must be construed to mean an ‘objective and verifiable’ reason that “‘keenly” or “‘irresistibly” grabs our attention’; is ‘of “considerable worth” in deciding the length of a sentence’; and ‘exists only in exceptional cases.’” *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). To be objective and verifiable, the factors “must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, the trial court cannot depart from the sentencing guidelines based on a factor or characteristic that is previously taken into consideration in the calculation of the sentencing range unless the trial court has determined that the factor or characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

Defendant argues that the guidelines scoring accounted for all of his felonies and “for nearly all of [his] prior misdemeanor convictions.” Further, defendant contends that “[t]he

absolute number of pages in a driving record would . . . not constitute an objective and substantial reason to deviate from the guidelines.” We disagree that an error requiring reversal occurred. Defendant’s record presented an exceptional reason to support an upward departure from the sentencing guidelines because, although his record was factored into the scoring, his score does not reflect all of his prior misdemeanors and that this is his eleventh conviction for drunk driving. The trial court did not abuse its discretion in determining that the sentencing guidelines gave inadequate weight to the fact that defendant had eleven drinking and driving offenses, because the scoring did not adequately reflect defendant’s repeated pattern of driving while intoxicated. Indeed, the sentencing guidelines variables do not specifically consider a history of a large number of driving while intoxicated offenses. See MCL 777.31 to MCL 777.57 (defining the guidelines variables).

Defendant next argues that the circumstances surrounding the offense, specifically his erratic driving and his abusive behavior toward a witness during the incident, were subjective factors rather than objective ones and should not have been used by the court to enhance his sentence. We disagree that the court erred. Defendant engaged in extraordinarily dangerous, as well as objective and verifiable, driving that consisted of driving in the wrong lane and running other vehicles off the road, running a stop sign, and backing into another vehicle and fleeing. Further, defendant’s behavior in the parking lot where he was eventually arrested was clearly abusive and offensive and constituted a legitimate, objective reason for the trial court to depart upward from the sentencing guidelines. *Abramski, supra* at 74-75.

Finally, defendant argues that the court’s past efforts to control his substance abuse through probation and enrollment in three residential treatment programs was not a substantial and compelling reason for an upward departure from the guidelines because the Legislature did not specifically enumerate and incorporate it as a relevant factor. We disagree. Trial courts have the discretion to depart upward from the sentencing guidelines specifically for such substantial and compelling reasons that are not specifically incorporated into the guidelines calculation. Defendant’s background concerning drinking and driving, namely his failure to stop driving while intoxicated despite repeated efforts to provide him with substance abuse treatment, warranted a longer sentence than the guidelines recommended, given that it tended to show defendant’s lack of desire or potential for rehabilitation.

The reasons given by the trial court in departing upward from the sentencing guidelines were objective and verifiable, and the court did not abuse its discretion in determining that these were substantial and compelling reasons for a departure.

Defendant also argues that there was a lack of probable cause for his arrest and that, as a result, the search warrant authorizing the testing of his blood-alcohol level was invalid. Because defendant did not challenge the validity of the search warrant on this ground below, this issue is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) (objection on one ground does not preserve appellate attack on a different ground). We review for plain error affecting defendant’s substantial rights. *People v Grayer*, 252 Mich App 349, 352; 651 NW2d 818 (2002).

A police officer may arrest a person without a warrant under MCL 764.15(1)(d) for even first-offense OWI if there is reasonable cause to believe the person committed the crime, because it is a misdemeanor punishable by more than 92 days’ imprisonment. *People v Stephen*, 262

Mich App 213, 219; 685 NW2d 309 (2004); MCL 257.625(9)(a).¹ A police officer has probable cause for a warrantless arrest if “the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the [crime].” *People v Tierney*, 266 Mich App 687, 705; 703 NW2d 204 (2005), quoting *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998).

Although the police did not observe defendant in the act of driving, such first-hand observations were not necessary to support the arrest. See *Stephen*, *supra* at 219-220. Deputy Schnepf, the arresting officer, testified that when he arrived on the scene in response to the radio traffic involving an intoxicated driver of a Blazer being involved in an accident, he observed defendant, who was sitting alone in a Blazer, as having alcohol on his breath, bloodshot eyes, and “very poor balance.” Deputy Schnepf also observed empty beer bottles on the floorboards of the Blazer and a puddle outside of the door on the driver’s side that smelled like beer. When Deputy Schnepf asked defendant some questions, defendant slurred his words in an incoherent manner. Deputy Schnepf administered four sobriety tests to defendant, and defendant performed very poorly on them. Deputy Schnepf arrested defendant after the sobriety tests. According to *Stephen*, *supra*, it was not necessary that Deputy Schnepf actually see defendant driving his vehicle while intoxicated. From the circumstances indicating that defendant had been driving and the evidence of his intoxication, it seems apparent there was probable cause for the arrest. It is certainly not plain that such probable cause was lacking. Thus, defendant has not shown plain error, *Grayer*, *supra* at 352, entitling him to relief on this unpreserved issue.

Defendant’s contention that his trial counsel was ineffective for failing to raise the probable cause issue likewise fails. For this Court to reverse due to ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

As previously noted, it is clear from Deputy Schnepf’s testimony that there was probable cause for defendant’s arrest and that any attempt by defense counsel to object on the basis of a lack of probable cause for the arrest would have been futile. Therefore, defendant has not shown that defense counsel’s performance fell below an objective standard of reasonableness.

¹ Thus, it is immaterial whether Deputy Schnepf knew of defendant’s prior alcohol-related driving convictions when he arrested defendant.

Affirmed.

/s/ Patrick M. Meter

/s/ Alton T. Davis